and have become an indispensable necessity, they are entirely of a national character, so much so as to exclude all state control in times of war or civil commotion.

2. In regard to postal communication, which has been regarded as exclusively of a national character, since the early and palmy days of the Persian monarchy, where public posts are said to have originated, railways must also be regarded as an indispensable necessity. For if we admit the right of state control over all, or any considerable portion of the railways in the country, it will place all postal communication at the mercy and good will of state authority, which any one must see is wholly inadmissible.

We have discussed the rights of railway corporations in regard to acquiring land and other prerogative rights in adjoining states, without the action of the legislature, in a case in Vermont, many years since, when we came to the conclusion that no such prerogative rights could be acquired out of the state of the charter, except by legislative act: State *v.* B. C. & Al. Railway, 21 Vt. R. 433. This will not preclude such corporations from acquiring the title of land out of the state, by voluntary contract, or entering into any other contract, of the ordinary character of contracts between natural persons; but it will not justify taking land compulsorily, or operating a railway and taking tolls, &c.

I. F. R.

Supreme Court of Pennsylvania.

HOFFMAN *v.* BECHTEL.

Where a creditor employs legal process against a debtor in the usual way and without unnecessary delay, it is *primâ facie* proof of such diligence in collecting his debt as will give him a claim against a guarantor.

But this presumption may be overcome by proof that the creditor had special knowledge of assets or opportunity of collecting his debt, and that his failure to do so was the result of bad faith, or neglect to do what a prudent creditor who had no other security but the debtor's obligation would have done under the circumstances.

THE opinion of the court was delivered by

STRONG, J.—The contract of guaranty is peculiar. Unlike that of an ordinary surety, it is collateral and secondary. The creditor must resort in the first instance to the debtor, and the guarantor is liable only after the debtor has proved insolvent, and the creditor has used due diligence to obtain payment from him unsuccessfully. But what is due diligence? Perhaps it is impossible to define it with any degree of certainty. It must vary with the circumstances of each case, and hence it is a question for the jury: *Rudy* v. *Wolf*, 16 S. & R. 79. It cannot be less than such as a vigilant creditor ordinarily employs to recover

a debt for which he has no other surety than the obligation of the debtor. The guarantor has certainly a right to expect an honest and intelligent effort of the creditor to obtain payment from the person primarily liable. Unless it be shown that legal process would have been fruitless, it is the creditor's duty to employ that process without unnecessary delay, and if he does, there is a legal presumption that he has been duly diligent. This is all that was decided in *Kirkpatrick* v. *White*, 5 Casey 176, and *Gilbert* v. *Henck*, 6 Id. 205. But this presumption is not a conclusive one. There may be cases in which something more may be due than simply suing out legal process, and letting it run its course. This is intimated in both the cases last referred to. In *Kirkpatrick* v. *White*, Judge LOWRIE said, due diligence does not require the creditor to accompany the collecting officer and show him personal property, *unless he has some special knowledge relating to it;* and in *Gilbert* v. *Henck* the same judge said that when the principal is not liable to a *ca. sa.*, and the plaintiff has issued a *fi. fa.*, and it is returned "*nulla bona*," he has done all that the law requires of him in favor of the guarantor, "unless it be shown that the principal had property in some other county that was known to the plaintiff, or ought to have been, and that could be reached by ordinary execution process." Here is a clear recognition of a duty resting upon the creditor holding a guarantee of a third person, to do more in some cases than employ legal process against the debtor, and let it run its undisturbed course. He may often know that the debtor has tangible property quite sufficient to satisfy the debt, which the sheriff, without his aid, cannot discover. Surely, due diligence, in such circumstances, requires him to do more than put an execution into the hands of the officer of the law. No jury would doubt that vigilant creditors would do more if they had no surety or guarantor for the debt. It is not, then, to be taken as an universal rule that a creditor has done his whole duty to one who had guaranteed the debt to him, when he has sued out legal process against the debtor, and placed it in the hands of the proper officer. The most that can be claimed for it is, that it makes a *primâ facie* case of due diligence, which may be overcome by proof of want of good faith in the creditor, and by proof that the failure to recover from the debtor was in consequence of the creditor's neglect to do what other prudent creditors, in like cir-

cumstances, would ordinarily have done: *Brown* v. *Brook*, 1 Casey 210; *Overton* v. *Tracy*, 14 S. & R. 327.

These principles lead to the conclusion that the court below fell into error in rejecting some of the evidence offered by the defendant. The offer which we think should have been received was evidence to prove that the debtor was the owner of a lot and two houses thereon, worth two thousand five hundred dollars, upon which the judgment entered on the bond, guaranteed by the defendant, was a lien; that the lot was subject to prior incumbrances, amounting to about five hundred dollars; that under the execution issued by the plaintiff the lot was sold for seventy dollars to the wife of the debtor; that the plaintiff paid no attention to the sale, absented himself from it; that after the sale was made he came to the place, and remarked that he did not care, as he was secured for his claim; that he made no effort to have the sale set aside, and a resale ordered, and that he privately offered to the purchaser an advance on his bid if the purchaser would transfer the bid to him. We must of course now assume that all this could have been proved, and that it would have been had the court allowed the evidence to be given. The question to be answered then is, would it have tended to show want of good faith to the guarantor, or failure to use that diligence in collecting the debt from Henninger, the debtor, which prudent creditors ordinarily exert in collecting debts due to them? We think it would, and that it should have been submitted to the jury for them to find whether it was sufficient to overcome the *primâ facie* case made out by the plaintiff. We do not assert that it is the duty of a creditor, to whom a guaranty has been given, to attend the sheriff's sale of his debtor's property, and there bid upon it. Generally it is not. But there is much more in this case. All the facts are to be considered, and considered as bearing upon each other. The declaration of the plaintiff; the private offer to take the bid; the fact that the wife of the defendant was the purchaser; that the property sold for less than one-twentieth of its value, and that the plaintiff refused to apply to the court to set aside the sheriff's sale, all are more or less significant. It must be left to a jury to say whether they show that the plaintiff failed to use with good faith that diligence in collecting the debt from Henninger which prudent creditors ordinarily employ. If they do show that, they will avail for the defendant.

The other assignments of error are not sustained. The mere fact that the personal property was worth much more than it brought at the sheriff's sale was of no importance in itself, and the charge given to the jury upon the facts in evidence was entirely accurate. But for the first reason we have mentioned, a new *venire* must be ordered.

Judgment reversed, and a *venire de novo* awarded.

RECENT ENGLISH DECISIONS.

Court of Exchequer.

WILSON *v.* THE NEWPORT DOCK COMPANY.

The defendants, owners of docks in a river, agreed with the plaintiff, a shipowner, to receive his ship into their docks. When the time came for receiving the ship, they were unable to do so. The ship lay in the river, and, as the tide fell, she stranded, broke her back, and was seriously damaged. In an action for the breach of the contract to receive the ship into the dock, the plaintiff sought to recover for the injury to the ship as special damage. The judge asked the jury, first, whether there was a place of safety to which the ship might have been taken; and, if so, secondly, whether the captain or pilot had been guilty of negligence in not taking her there. The jury gave no answer to the first question, but, to the second, answered that the captain and pilot did the best they could under the circumstances, and were neither of them guilty of any negligence. The judge thereupon directed a verdict for the plaintiff for the damages claimed.

Held (per POLLOCK, C. B., CHANNELL and PIGOTT, BB.), that, upon the finding of the jury, the court could not decide whether the plaintiff was entitled to the damages claimed or not.

Held (per MARTIN, B.), that the plaintiff was entitled to the damages claimed.

Hadley v. *Baxendale*, 9 Exch. 341, commented upon.

THE declaration was for the breach of a contract to receive the plaintiff's ship into the defendant's dock, alleging, as special damage, that the ship, being left in the river, as the tide fell, grounded and sustained injury.

The defendants paid £15 into court.

The plaintiff replied that this sum was insufficient; upon which issue was joined.

The action was tried before BYLES, J., at the last Monmouthshire Summer Assizes, and the facts proved were as follows:—The defendants were the proprietors of a wet-dock upon the Usk,